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**Court of Appeals**  
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**State of Washington**  
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NO. 55983-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

TAYLOR K.D. HARRISON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Clallam County Superior Court No. 20-1-00081-6

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

The trial court was presented with an objection to a peremptory challenge to a juror that neither defense counsel, prosecutor, nor the court were certain as to whether the juror was part of a racial minority. The trial court proceeded on the assumption that juror no. 28 was from a racial minority group. The court documented its analysis under GR 37 and determined that the prosecutor's reason for the challenge to juror no. 28 was her statement that she would have a difficult time being impartial.

Was the trial court's grant of the peremptory challenge to juror no. 28 proper because, based on the record, an objective observer could not find that the prosecutor's reason for the challenge was related to race or ethnicity, but rather, was an effort to empanel an impartial jury?

## **II. STATEMENT OF THE CASE**

During jury selection, the prosecution engaged in a conversation with potential juror no. 28 about her ability to be a

fair and impartial juror considering then recent events in the news involving matters of racial injustice:

MR. SNIPE: Okay. So here's a bit of a touchy one, so at this point you can see the Defendant, you can see the lead investigator, I have some questions that pertain to race and identity. I'll simply state right off, the State does not believe this is a case involving race, racism or identity, but because of what's happened in the news in the last year I'm obligated to ask this. Does anyone in the room feel that they can not be fair to the Defendant, to law enforcement, to the attorneys, to the process to any aspect of this criminal case because of race or their feelings about race? Number 28?

JUROR: Um, I just feel because of everything on the news that it does get a little difficult, especially, you know, police officers and Black Lives Matter and all that. I just have a -- you know, I don't know if I can be fair.

MR. SNIPE: Okay. How do you mean?

JUROR: I'm not sure. Uh, I mean, I guess I can listen to the evidence and, you know, and try to be but it's kind of difficult I think maybe because I've been watching too much of the news and media and everything and it's -- it just gets tough.

MR. SNIPE: Okay, I appreciate your honesty. Does anyone feel like they cannot separate what's happened in the past year with the facts of this particular case? (No audible response.)

And I do want to be clear, the State, represented by me as the deputy prosecutor, does believe in the charges as brought and does intend to prove them, but the State, represented by me, wants the opportunity to prove that in a system that's not biased by any sort of racial motivation, by animus, by any kind of feelings one way or the other. The State wants to see the Defendant get a fair trial and the officers have a chance to hear their testimony heard as well, as well as all the people involved. Does anyone here feel that they can not provide that opportunity for a fair trial to the Defendant, to Officer Cooper, to anyone else involved in the case?

(No audible response.)

RP 205–06.

During the jury selection process, the prosecutor moved to excuse juror no. 28. RP 248. Defense counsel raised his concerns regarding the State's peremptory challenge of juror no. 28 and the trial court addressed the matter outside the presence of the jury. RP 248–49. Defense counsel perceived Juror no. 28 to be non-Caucasian. RP 260.

When the parties reconvened with the jury, the trial court granted the State's peremptory challenge and excused juror no. 28. RP 249.

Outside the presence of the jury, the trial court made a record of discussions regarding the peremptory challenge of juror no. 28. RP 259. The trial court emphasized that the defense objection to the challenge was based upon counsel's perception that juror number 28 was a non-Caucasian member of a racial or ethnic minority group triggering GR 37. RP 260.

The court then reiterated that the prosecutor "explained to the Court that the basis for the exercise of the peremptory as to juror number 28 was the result of statements that she made during the course of voir dire, including that she wasn't sure that she could be fair, she's mindful of current events related to the Black Lives Matter movement and issues circulating around that cause. She also indicated, uh, that she was mindful of and potentially susceptible to news media influences with respect to issues of racial justice and fairness." RP 260.

The trial court pointed out further that the prosecutor “had exercised a peremptory in seeking dismissal of juror number 26 as well, uh, just prior to exercising his peremptory with respect to juror number 28. And his stated reasons with respect to juror number 26 were the same as those reasons for juror number 28.” RP 260. The court noted that juror number 26 did not appear to be a member of an ethnic minority group. RP 260–61.

The court recollected that the prosecutor did not specifically target juror number 28 during questioning. RP 261. Rather, the prosecutor’s questions “tended to be of a more open nature to the group, uh, seeking individuals to volunteer their answers and, uh, there [w]as no particular effort that the Court detected to specifically call out juror number 28 because of the -- any perceptible ethnic or racial minority membership as to juror number 28.” RP 261.



The trial court put its analysis and reasoning on the record as to why it granted the State's peremptory challenge in light of GR 37:

[T]he Court recognizes that in considering GR-37 objections, the standard for the Court to exercise is through the lens of an objective observer. An objective observer meaning one who's aware that implicit institutional and unconscious biases, in addition to purposeful discrimination, has resulted in the unfair exclusion of potential jurors in Washington State, and when viewing through the lens of that observer, uh, the court could view race or ethnicity as a factor in the use of the peremptory challenge, if that is the case then the peremptory challenge is denied. The Court at the time did not see that race or ethnicity was a factor. Rather, juror number 28 had expressed her concerns that she would not be able to be neutral. And, uh -- granted, her concerns about neutrality related to matters of race, but there was no indication that her race had anything to do with those concerns and the prevailing issue for the State appear to have been whether in fact the witness was capable of being a fair and impartial -- rather, whether the juror was capable of being a fair and impartial juror.

RP 260–61.

The trial court then examined some of the factors to consider set forth in GR 37(g).

First the trial court considered the number and types of questions posed to the prospective juror. As to this factor, the court recalled that “juror number 28 volunteered this information in response to a general question that wasn’t necessarily specifically targeted to juror number 28.” RP 262.

Next the trial court considered “whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror.” RP 262. To this question the court pointed out that “nature of the question or questions that were put to juror number 28 is similar to questions that were put to other jurors, and, uh, again did not appear to be targeted to juror number 28 on the basis of race or ethnicity.” RP 262.

Then the trial court considered “[w]hether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party.” RP 262. To this inquiry the court noted that “the only occasion that the Court is aware of where another prospective juror who provided a similar

answer was subject to peremptory was the exercise of the peremptory challenge with respect to juror number 26 just prior to the exercise of the peremptory with respect to juror number 28.” RP 262–63.

The trial court also considered “whether a reason might be disproportionately associated with a race or ethnicity” and determined that “there was nothing to indicate that [the prosecution] had specifically targeted juror number 28 on some perception that he may have had that she was a member of a racial or ethnic minority.” RP 263.

Then the trial court considered reasons set forth in GR 37(h) that would be presumptively invalid including “whether a person has expressed a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling.”

In regards to this inquiry, the trial court stated that “to the extent that juror number 28 suggested that she may have trouble being fair, uh, there was no discussion that the Court can recall from juror number 28 that had anything to do with an expression

of distrust for law enforcement. Rather, she was just explaining that she felt she would have a difficult time being impartial.” RP 262.

The court then allowed defense counsel further opportunity to flesh out his objection for the record. Defense counsel then pointed out that the court need not find purposeful discrimination in order to deny the peremptory challenge. RP 264. Alluding to GR 37(h)(i) and (ii), counsel pointed out that “having a prior contact with law enforcement officers, expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling” are invalid reasons and that was “more or less what [juror no. 28] was saying.” RP 264. Counsel also pointed out that, although he was not completely sure, juror no. 28 was the only juror that appeared to be a minority. RP 263–64.

The prosecution then expressed that he agreed with defense counsel’s “statement that we’re not certain as to whether or not the juror was a member of a[n] ethnic minority. We’re

certainly operating under an assumption and I have no problem with that assumption, but, um, certainly the State could not say for certain whether the juror -- potential juror was a member of an ethnic minority, or if so, which ethnic minority.” RP 265.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY GRANTED THE STATE’S PEREMPTORY CHALLENGE OF JUROR NO. 28 BECAUSE THE CHALLENGE WAS OBJECTIVELY UNRELATED TO RACE OR ETHNICITY.**

“The purpose of [GR 37] is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” GR 37(a).

GR 37 provides that either a party or the court “may object to the use of a peremptory challenge to raise the issue of improper bias.” GR 37(c). After an objection has been raised, the party exercising a peremptory challenge is required to articulate its reasons for doing so. GR 37(d).

The trial court then evaluates the reasons for exercising the challenge under the totality of the circumstances. GR 37(e).

If “an objective observer *could* view race or ethnicity as a *factor* in the use of the peremptory challenge, then the

peremptory challenge shall be denied.” GR 37(e) (emphasis added).

GR 37(f) defines “objective observer” as one who “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington.”

*State v. Listoe*, 15 Wn. App. 2d 308, 319, 475 P.3d 534, 540, (2020).

“[T]he question of whether an objective observer could view race or ethnicity as a factor in a peremptory challenge is subject to de novo review.” *Id.* at 321 (citing *State v. Jefferson*, 192 Wn.2d 225, 250, 429 P.3d 467 (2018)); *see also State v. Omar*, 12 Wn. App. 2d 747, 751, 460 P.3d 225 (2020).

In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions

of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

GR 37(g); *see also Listoe*, 15 Wn. App.2d at 321–22.

GR 37(h) sets forth presumptively invalid reasons for a peremptory challenge. A reason at issue raised by Harrison in this case is GR(h)(ii): “expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling[.]”

Here, the State moved to excuse juror no. 28 because she expressed concerns that she could not be an impartial juror. RP 260, 263. Additionally, neither the defense, the State, nor the Court was even sure whether juror no. 28 was from a racial minority in the first place. Therefore, under these circumstances,

an objective person could not view race as a factor in the State's peremptory challenge of juror no. 28.

**1. Examination of factors under GR 37(g) show that the prosecutor's decision to use a peremptory challenge for juror no. 28 was race neutral.**

GR 37(g)(i–iv) sets forth a non-exclusive list of factors to consider when evaluating the justification for peremptory challenges. Examination of these factors show that the prosecutor's decision to challenge juror no. 28 was unrelated to race or ethnicity.

Under GR 37(g)(i) the court considers “the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it[.]”

As to this factor, the trial court recalled that “juror number 28 volunteered this information *in response to a general question*



that wasn't necessarily specifically targeted to juror number 28.”  
RP 262.

Under GR 37(g)(ii) the court considers whether the prosecutor asked significantly more questions or different questions of juror no. 28 in contrast to other jurors.

To this question the court pointed out that “nature of the question or questions that were put to juror number 28 is similar to questions that were put to other jurors, and, uh, again did not appear to be targeted to juror number 28 on the basis of race or ethnicity.” RP 262. The record shows that the prosecutor did not ask significantly more or different questions of juror 28 than other jurors. The questions asked of juror no 28 were similar in nature to questions asked of other jurors.

Under the third factor, GR 37(g)(iii), the court considers “whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party[.]”

This factor shows the State's challenge of juror no. 28 was objectively unrelated to race because the State moved to

excuse juror no. 26 for the same reasons as it did for juror no. 28 and there are no indications that juror no. 26 was of a minority race as pointed out by the trial court. RP 248, 260, 263.

Finally, under GR 37(g)(iv) the court considers “whether a reason might be disproportionately associated with a race or ethnicity[.]”

As to this factor, the trial court noted that there was nothing to indicate that the prosecutor specifically targeted juror no. 28 due to her race or ethnicity. RP 263. Moreover, the prosecutor was not even sure if juror no. 28 was part of a racial or ethnic minority group. Thus, there is no indication that the prosecutor’s reason was disproportionally associated with race or ethnicity.

**2. The prosecutor did not have a presumptively invalid reason for the peremptory challenge of juror no. 28.**

GR 37(h) also sets forth what are deemed to be presumptively invalid reasons. Here, the only one at issue,

raised by Harrison, is GR 37(h)(ii): “expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling[.]”

Harrison mistakenly equates the concerns that juror no. 28 expressed with the prosecutor’s reasons for the peremptory challenge. GR 37(h)(ii) inquires into the prosecutor’s reasons for the peremptory challenge, not the juror’s statements. Here the prosecutor did not give this reason under GR 37(h)(ii) as his own for using the peremptory challenge for juror no. 28.

Furthermore, GR 37 is designed to guard against the unfair exclusion of jurors on account of their race or ethnicity. *See* GR 37(a). Thus GR 37 falls under the rubric of the Equal Protection Clause which “forbids the prosecutor to challenge potential jurors solely on account of their race . . . .” *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986).

Thus the focus is not on juror’s concerns or attitudes about racial issues, but rather on whether a juror’s race or ethnicity could be a factor in the prosecutor’s reason for a peremptory

challenge. For example, a juror from a racial minority that demonstrates racial animus towards the defendant *should* be challenged. But it would be incorrect to characterize the challenge in a GR 37 context as involving race as a factor if the challenge had nothing to do with that juror's race or ethnicity.

Here, there is nothing in the record tending to show that juror no. 28's race or ethnicity was a factor in the use of the peremptory challenge although that juror expressed concerns related to racial injustice issues which were prevalent in the media.

On the contrary, the record shows that the prosecutor's reason for the challenge was because juror no. 28 expressed that she was not sure she could be an unbiased juror. GR 37 does not require any party to accept a juror who warns they may be not be able to be impartial.

The trial court considered GR 37(h)(ii) as follows:

Rather, juror number 28 had expressed her concerns that she would not be able to be neutral. And, uh -- granted, her concerns about neutrality related to matters of race, but

there was no indication that her race had anything to do with those concerns and the prevailing issue for the State appear to have been whether in fact the witness was capable of being a fair and impartial -- rather, whether the *juror* was capable of being a fair and impartial juror.

RP 260–61.

[T]o the extent that juror number 28 suggested that she may have trouble being fair, uh, there was no discussion that the Court can recall from juror number 28 that had anything to do with an expression of distrust for law enforcement. Rather, she was just explaining that she felt she would have a difficult time being impartial.

RP 263.

Thus, the reason for the peremptory challenge was not because juror no. 28 expressed distrust of law enforcement or a belief that law enforcement officers engage in racial profiling.

GR 37(h)(ii).

Under the circumstances of this case, an objective observer could not view race or ethnicity as a factor in the State's use of the peremptory challenge for juror no. 28. Therefore the trial court did not err in granting the challenge.

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#### **IV. CONCLUSION**

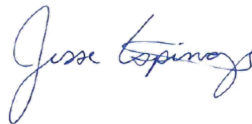
The parties were not sure that juror no. 28 was from a racial minority group but they proceeded on that assumption. Additionally, the prosecutor's reason for the peremptory challenge for juror no. 28 was because juror no. 28 expressed concerns about her ability to be an impartial juror. Thus an objective observer could not view juror no. 28's race or ethnicity as a factor in the use of the peremptory challenge.

Therefore, this Court should affirm the conviction.

This document contains 3344 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of June, 2022.

**MARK B. NICHOLS**  
Prosecuting Attorney

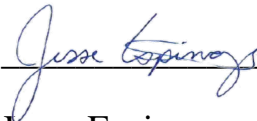
A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is cursive and stylized.

**JESSE ESPINOZA**  
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## **CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Peter B. Tiller on June 21, 2022.

MARK B. NICHOLS, Prosecutor

  
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